Ret. in Oct. [illegible] 15 1878 7-164

Submitted 7 Otto, 164

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 522.

THE UNITED STATES, APPELLANTS,

vs.

E. E. NORTON, ASSIGNEE IN BANKRUPTCY OF SAMUEL DEBOW & COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 14, 1876.

Jan 26 1878

Affirmed

No Opinion

SUPREME COURT OF THE UNITED STATES.

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E. E. NORTON, ASSIGNEE IN BANKRUPTCY OF SAMUEL DEBOW & COMPANY.

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1 *Petition.—Filed June* 12, 1871.—*J. R.*

United States Court of Claims, December term, 1871.

E. E. NORTON, ASSIGNEE IN BANKRUPTCY of firm of Samuel DeBow & Co., bankrupts,
vs.
THE UNITED STATES.
} No. 6342.

To the honorable the Court of Claims:

The petition of Emory E. Norton, a citizen of Stroudsbourg, State of Pennsylvania, temporarily residing in the city of New Orleans, La., herein appearing as the assignee in bankruptcy of the commercial firm of Samuel DeBow & Co., bankrupts, with respect represents:

That the said firm of Samuel DeBow & Co., on the petition of the parties composing the same, to wit, Samuel DeBow and Charles Janvier, residents of New Orleans, Louisiana, was, on the 15th day of January, 1868, duly adjudged a bankrupt in the district court of the United States for the district of Louisiana; and that on the 29th day of Feb., 1868, your petitioner was duly appointed and qualified as the assignee in bankruptcy of said commercial firm, bankrupt, under the deed of assignment to him therein made by said court at said date of appointment.

Your petitioner now represents that the said firm of Sam'l DeBow & Co., doing business in New Orleans in the year 1865, engaged in a transaction in cotton in the month of June, 1865, under the authority of an act of Congress of July 2d, 1864, by which it was enacted that it "should be lawful for the Secretary of the Treasury, with the approval of the President, to authorize agents to purchase for the United States any products of States declared in insurrection, at such places as shall be designated by him, at such prices as shall be agreed upon with the seller, not exceeding the market-value thereof at the place of delivery, nor exceeding three-fourths of the market-value thereof in the city of New York, at the latest quotations known to the agent purchasing."

Your petitioner further shows that, under the authority of said act of Congress, and in accordance therewith, the Secretary of the Treasury issued on the 24th day of September, 1864, with the approval of the
2 President of same date, general regulations, and on the 9th day of May, 1865, with the approval of the President of the same date, amended regulations for the purchase of the products of the insurrectionary States on government account.

That accordingly, and under said regulations, the said firm of Samuel DeBow & Co. sold to the United States, and repurchased through O. N. Cutler, the purchasing-agent of the United States at the city of New Orleans, on the 14th day of June, 1865, one hundred and twenty-five bales of cotton of the class of barely ordinary cotton, weighing 49,364 pounds; that the whole amount of the sale was $12,834.64, and that the one-fourth of said proceeds thereof, paid and abandoned to the said O. N. Cutler, purchasing-agent, for the use of the United States, was the sum of $3,208.66.

Your petitioner further avers that, on the 17th of June, 1865, the said Samuel DeBow & Co. sold and repurchased through said O. N. Cutler, at said city of New Orleans, twenty bales of cotton of the class of low middling, weighing 8,060 pounds, and abandoned for the use of the United States the one-fourth part thereof, to wit, five bales.

Your petitioner further avers that the surrender and payment by said Samuel DeBow & Co. of said sum of $3,208.66 and said five bales of cotton was illegally exacted of them, and was made by them in error, because,

before the said transaction was perfected, to wit, on the 13th day of June, 1865, the President of the United States had annulled and removed all restrictions on trade east of the Mississippi River, as by law he had a right to do, and thereby the 8th section of said act of Congress of July 2d, 1864, under which said one-fourth was claimed, was repealed and became inoperative as regards the city of New Orleans, which lies east of the Mississippi River.

Your petitioner further avers that he is advised and believes that the said O. N. Cutler, purchasing-agent of the United States, regularly rendered his accounts to the U. S. Treasury Department, and that under the direction of the government the aforesaid cotton was regularly sold, and the said proceeds thereof paid over into the Treasury of the United States by said agent.

And whereas from the premises it appears that the Government of the United States has thus erroneously and illegally obtained the aforesaid sum of $3,208.66 and five bales of cotton, an implied obligation therefore arises on the part of the United States to refund to your petitioner the said sum of $3,208.66 and the proceeds of said five bales.

Wherefore your petitioner submits and prays that a decree may be rendered, declaring that he is entitled to recover from the Government of the United States the aforesaid sum of $3,208.66, and the amount of the proceeds of said five bales of cotton.

Your petitioner further avers that both he and the said Sam'l DeBow & Co. have always been loyal citizens of the United States, and
3 have borne true allegiance to the government thereof, and have not in any way voluntarily aided, abetted, or given encouragement to the rebellion against said government.

LOUIS JANIN & SONS,
Washington, D. C., Solicitors for Claimant.

Address of claimant, New Orleans, La.

E. E. Norton, assignee in bankruptcy of the estate of Samuel DeBow & Co., bankrupt, being duly sworn, deposes that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said government; that no assignment or transfer of the claim set forth in the foregoing petition, or any part thereof, or any interest therein, has been made, except as in the said petition stated; that the affiant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true.

E. E. NORTON,
Assignee, &c.

Sworn to and subcribed before me this fifth day of June, 1871.
[SEAL.] D. URBAN,
United States Commissioner.

4 In the Court of Claims of the United States, December term, A. D. 1870.

E. E. NORTON, ASSIGNEE OF DEBOW & CO.,
vs.
THE UNITED STATES. } No. 6342.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not con-

fessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of three thousand two hundred and eight dollars and sixty-six cents and the proceeds of five bales of cotton, says that they are not indebted to the said claimant in the said sum of money nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS H. TALBOT,
Assistant Attorney-General.

Filed August 11, 1871.

5 In the Court of Claims.

E. E. NORTON, ASSIGNEE IN BANKRUPTCY OF Samuel DeBow & Company,
vs.
THE UNITED STATES. } 6342.

At a Court of Claims held at the Capitol, in the city of Washington, the 17th day of April, A. D. 1876, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said E. E. Norton, assignee in bankruptcy of Samuel DeBow and Company, do have and recover of and from the United States the sum of three thousand two hundred and eight dollars and sixty-six cents ($3,208$\frac{66}{100}$), exacted from him on the 13th day of June, 1865, for cotton brought from the east bank of the Mississippi; and that his claim founded on cotton brought in on the same day from the west bank of the Mississippi be dismissed.

By the court.

A true copy of record.

6 In the Court of Claims of the United States, Dec. term, 1875.

E. E. NORTON, ASSIGNEE IN BANKRUPTCY OF Samuel DeBow & Co.,
vs.
THE UNITED STATES. } No. 6342.

From the judgment rendered in the above-entitled cause on the 17th April, 1876, in favor of claimant, the defendants, by their Attorney-General, on the 14th day of July, 1876, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Ass't Attorney-General.

Filed July 15, 1876.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

7 Court of Claims.

E. E. NORTON, ASSIGNEE IN BANRUPTCY OF firm of Samuel DeBow & Co., bankrupts,
vs.
THE UNITED STATES.
} No. 6342.

Findings of fact.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the 12th June, 1865, there arrived at New Orleans, on the steamer Grey Eagle, from Vicksburg, one hundred and twenty-five bales of cotton belonging to Samuel DeBow & Co., the claimants, assignors in bankruptcy.

8 At that time no shipments of cotton to New Orleans were allowed except such as were consigned to the purchasing-agent of the Treasury. On the 13th June, 1865, DeBow & Co. executed a bill of sale of all the cotton to the purchasing-agent at an expressed consideration of $9,625.98, and the purchasing-agent executed to them another bill of sale of all the cotton at an expressed consideration of $12,834.64. DeBow & Co. thereupon paid to the Treasury-agent the difference, viz, $3,208.66, and received the cotton; such interchanged bills of sale & payment being in fact one transaction, intended to be in compliance with the provisions of the act 2d July, 1864 (13 Stat. L., 375), and the Treasury regulations thereunder of 9th May, 1865, relating to the "purchase of products of the insurrectionary States on government account."

9 The Treasury-agent also reported the said amount of $3,208.66 as being "25 per cent. retained on government account," and it was duly accounted for by him and paid into the Treasury. When this sale and resale took place neither DeBow & Co. nor the Treasury-agent had knowledge of the President's proclamation 13th June, 1865, annulling restrictions upon trade east of the Mississippi.

II. On the 13th June, 1865, there also arrived at New Orleans on the steamer Nina Simms, from some point west of the Mississippi, twenty bales of cotton, also belonging to DeBow & Co. At that time no shipments of cotton to New Orleans were allowed except such as were consigned to the purchasing-agent of the Treasury.

10 On the 14th June, 1865, DeBow & Co. executed a bill of sale of the twenty bales of cotton to the Treasury-agent (there being no expressed consideration), and the Treasury-agent executed to them another bill of sale (also without an expressed consideration) of fifteen bales thereof. DeBow & Co. thereupon received the fifteen bales and the Treasury-agent retained the five bales, such interchanged bills of sale likewise being in fact but one transaction, intended to be in compliance with the act 2d July, 1864, and the Treasury regulations thereunder.

The agent subsequently sold the five bales of cotton retained by him, and the proceeds, amounting to $137.74 per bale, have been paid into the Treasury. When the five bales were retained on the 14th June,

11 1865, as aforesaid, neither DeBow nor the Treasury-agent had knowledge of the President's proclamation 13th June, 1865, annulling restrictions upon trade east of the Mississippi.

And upon the foregoing findings of fact the Court of Claims decides as

Conclusions of law:

I. The Treasury-agent in New Orleans, having control and possession of the claimant's cotton brought in from the east bank of the Mississippi, had no authority, on the 13th June, 1865, to retain the same or one-fourth thereof, nor to exact from the owner a payment equivalent to one-fourth of its value, under the act 2d July, 1864 (13 Stat. L., p. 375), and the owners should recover back the payment so exacted, it having been paid over to the defendants and being now in the Treasury.

12 II. The owner of cotton brought into New Orleans from the west bank of the Mississippi, under the act 2d July, 1864 (13 Stat. L., p. 375), and the Treasury regulations thereunder of 9th May, 1864, had no right to the possession or control thereof prior to the President's proclamation June 24th, 1865, except upon the payment of one-fourth of its value as prescribed by the regulations; and a payment so made by an owner to obtain possession of the cotton was voluntary, and cannot be recovered back.

By the court.

Filed February 26, 1876.

13 In the Court of Claims.

E. E. NORTON, ASSIGNEE OF DEBOW & CO., *vs.* THE UNITED STATES. } No. 6342.

The Attorney-General, on behalf of the United States, requests the court to find the following additional facts.

To the first finding: Sam. DeBow & Co., in their bill of sale for this cotton, acknowledged receipt of the consideration, $9,625.98. The bill of sale from Cutler returned the cotton to them free from all fees and internal-revenue taxes.

14 Upon the foregoing request the court makes the following order, to wit:

Allowed

One hundred and twenty bales of this cotton were marked "J. H." and five "J. H. E."

Upon the foregoing request the court makes the following order, to wit:

Refused as being evidence.

To the second finding: The bill of sale from Cutler returned the cotton to them free from all fees and internal-revenue taxes.

Upon the foregoing request the court makes the following order, to wit:

15 Allowed.

This cotton is marked "J. B."

Upon the foregoing request the court makes the following order, to wit:

Refused as being evidence.

THOMAS SIMONS,
Assistant Attorney-General.

Filed March 3, 1876.

16 Court of Claims.

E. F. NORTON, ASSIGNEE OF DEBOW & Co.,
vs.
THE UNITED STATES.

NOTT, J., delivered the opinion of the court.

The counsel for the claimant insists that the facts in this case are substantially identical with those in the case of La Peyre (8 C. Cls. R., p. 165), and that the decision of this court must necessarily follow that of the Supreme Court in that case. The counsel for the defendants is understood to concede the substantial identity of the facts, but to insist that the legal ground upon which the defense is now placed was not taken by the defendants' counsel in the case of La Peyre, and probably escaped the attention of the Supreme Court when deciding that case.

The former case singularly divided two courts, and was ordered to be reargued on the same point in each. That point involved a determination of the time when the proclamation June 24, 1865 (13 Stat. L., p. 769), took effect—a proclamation which terminated restrictions upon commercial intercourse in the insurrectionary districts, and virtually brought the non-intercourse act (12 Stat. L., p. 257) to an end. The immediate question before the two courts was whether a proclamation takes effect on the day of its date or on the day of its publication; but the ultimate question which concerned the case, and determined the decision, was whether restrictions upon commercial intercourse had ceased at New Orleans on the 24th of June, 1865, the day when the transaction between the claimant and the government was consummated. Upon this question, four judges of the Court of Claims, after reargument, stood equally divided, and judgment pro forma for the purposes of an appeal was rendered against the claimant. In the Supreme Court also, after reargument, five judges were for reversal and four for affirmance, and the judgment was accordingly reversed, with instructions to enter a judgment in favor of the claimant.

For the better understanding of the significance of this judgment of reversal, we now advert to the law and facts upon which the former case went up.

The non-intercourse enjoined by the act 13 July, 1861 (12 Stat. L., p. 237), was to continue only so long as hostilities existed, and was to end whenever the President, by proclamation, should declare that they had ended. Within the general rule of non-intercourse there was, nevertheless, allowed an exceptional restricted commercial intercourse which was regulated, so far as these cases were involved, by the act 2 July, 1864 (13 Stat. L., p. 375, § 8), and the Treasury regulations 9th May, 1865. The effect of the existing statutes and regulations was that cotton could not be brought into New Orleans except upon the payment of a bonus for the right thus to trade, which bonus was one-fourth of the cotton or of its value. In some instances, as in La Peyre's case, the bonus was paid in kind, by the actual retention of one-fourth of the cotton; in others, as in the case now before us, the payment was made in cash. In either case the form of the transaction was by a sale and resale of the cotton. Thus the owner here sold the cotton to the Treasury-agent at a nominal consideration of $9,625.98, and the Treasury-agent immediately sold it back to the owner at a nominal consideration of
17 $12,834.64, and the owner thereupon paid the difference, viz, $3,208.66, the sale and resale constituting in fact but one transaction. It is also to be noted that at the time of this transaction

the cotton was in the possession or under the control of the agent, and that an owner or importer could obtain control and possession only by going through the form of this transaction and paying the bonus which the regulations imposed. On the other hand, it is also to be noted that the cotton thus sold and resold was thereby freed from the payment of "all fees" and internal-revenue "taxes."

When the case of Le Peyre came up for consideration, it is apparent that two primary questions were involved, both of which must have been determined before it could have become necessary for the Supreme Court to proceed to the determination of the vexed and doubtful question of the proclamation. First, if the regulations were illegal and imposed no valid restriction upon this commercial intercourse, it was manifestly needless to determine whether they were abrogated on the 24th of June by the proclamation. This court in Block's case (8 C. Cls. R., p. 461) expressed this opinion as to the action of the Supreme Court in Le Peyre's case, and that court has more recently held in McClelland's case (10 C. Cls. R., p. 68) that kindred regulations affecting this species of traffic were lawful and obligatory. The second of these primary questions was whether Le Peyre had a case which could be sustained upon his own theory of the law—whether he could recover back the money paid into the Treasury if the restrictions upon commercial intercourse were, as he claimed, at an end. For, unless this primary question was likewise determined in favor of Le Peyre, manifestly it was needless to order a reargument upon what was only a resulting question—the time when the proclamation took effect—the time when restrictions upon commercial intercourse ceased.

It is true that a primary question of this character is sometimes overlooked by a court when it has not been discussed at the bar, but in view of the protracted consideration which the case of Le Peyre received, and the unusual pains bestowed upon it by the Supreme Court, we do not feel warranted in ascribing any such oversight to the deliberations of that tribunal. Apart from the fact of a reargument, there was also the important circumstance of a nearly equal divided court. Four of the nine judges thought that the claimant should not recover, but they rested their dissent exclusively upon the effect to be given to the proclamation. Upon all other points and questions the members of the court stood unanimous in his favor. The concurrence of the minority as to the primary rights of Le Peyre is thus announced in the dissenting opinion of Mr. Justice Hunt:

"If it [the proclamation] had vitality or existence on the 24th day of June, the government agent had no authority to retain the 119 bales of cotton by virtue of the law of 1864. If it had not existence on that day, he had authority, and the present claim is without foundation."

The counsel for the defendants places the defense of this case upon the general rule that a voluntary payment made in mutual mistake of law cannot be recovered back. As to the rule there can be no question; but whether the payment in this case was in legal effect voluntary is by no means free from doubt. The claimant's goods were in the possession of the Treasury agent; he, in the language of Mr. Justice Hunt, "had no authority to retain" them; yet he exacted a payment equal to one-fourth of their value as a condition to restoring them to the possession of the owner. In some cases it has been held that such a payment must be deemed to have been made under a moral duress (Astley v. Reynolds, Str. R., 915; Close v. Phipps, 7 Mann. & Gr., 586; Shaw v. Woodcock, 7 Barn. & Cress., 73; Atlee v. Backhouse, 3 Mees. & Wels., 633;
18 Oates v. Hudson, 6 Wels., H. & G., 346); in others it has been

held that the payment of an illegal tax, or impost, or official charge, is not voluntary, though no protest be made. (Adams case, 1 C. Cls. R., p. 306; Boston & Sandwich Glass Co. v. City of Boston, 4 Metcalfe, 181; Amesbury Woolen Co. v. Inhabitants of Amesbury, 17 Mass., 461; Preston v. Boston, 12 Pick., 7; Ripley v. Gelston, 9 Johns., 201; Clinton v. Strong, id., 370; Steele v. Williams, 20 Eng. Law & Eq., 319.) In short, there is a current of authorities which hold (apart from some statutory requirement of protest at the time of payment), that a payment made to a public officer who has the power of compulsion behind him, or a payment exacted by an officer colore officii as a condition to the delivery of a man's property, is never to be considered a voluntary act. As was said by the court in one of these cases (Clinton v. Strong), "It would lead to the grossest abuse to hold a payment made under such circumstances a voluntary payment, precluding a party from contesting it afterward." And, as was said by Baron Martin in another (Steele v. Williams), "As to whether the payment was voluntary, that has in truth nothing to do with the case; * * * to call it a voluntary payment is an abuse of language. * * * Where a party says, 'I charge you such a sum by virtue of an act of Parliament,' it matters not whether the money is paid before or after the service was rendered; if he is not entitled to claim it the money may be recovered back."

Therefore, without passing upon the applicability of the doctrine of involuntary payments exacted colore officii, there is abundant reason for saying that the Supreme Court might well have decided as it did and that if any judicial inadvertence existed it is for the Supreme Court, and not this, to correct the error.

It is also said by the counsel for the government that the owners receiving their cotton freed from the payment of all "fees" and internal-revenue "taxes" constituted a sufficient consideration to support the transaction. But such was the fact in the case of La Peyre, and it would seem that if the Supreme Court really held that the Treasury agent had no authority to exact anything from the owner, his illegal conduct could not be cured by his relinquishing a portion of the exaction, though put in the guise of a release from fees and internal-revenue taxes. If the government lost a tax by the transaction which it is entitled to receive, the modern English case of De Lancey v. The Queen (6 L. R. Exch., p. 286) is authority for saying that its right might have been asserted in this action by way of set-off.

A second cause of action is set up in the petition, viz, for the bonus exacted on other cotton brought in from the west bank of the Mississippi before the proclamation restoring commercial intercourse with territory on that side of the river had been issued. We think that demand is answered by the construction hereinbefore given to the decision of the Supreme Court in La Peyre's case, and by its decision in McClelland's (10 C. Cls. R., p. 68).

The judgment of the court is, that the claimant recover $3,208.66, exacted from him on the 13th June, 1865, for cotton brought from the east bank of the Mississippi, and that his claim founded on cotton brought in on the same day from the west bank of the Mississippi be dismissed.

RICHARDSON, J., was absent when the decision was announced, but had taken part in the consideration of the case and agreed in the conclusion of the court.

Under the decision just rendered in the case of Norton, assignee of DeBow & Co., v. The United States, the following judgments were entered:

19 In the case of White & Montgomery v. The United States, judgment in favor of the claimants for $3,443.50.

In the case of J. R. Bonnafon v. The United States, judgment in favor of the claimant for $2,066.10.

In the case of Norton, assignee of B. P. Ethell, v. The United States, judgment in favor of the claimant for $3,856.72.

20 In the Court of Claims.

E. E. NORTON, ASSIGNEE IN BANKRUPTCY of Samuel DeBow & Company,
vs.
THE UNITED STATES. } No. 6342.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney-General, for the defendants, for the allowance of an appeal, as filed in the clerk's office July 15, 1876, and of the order of the chief justice of said court allowing the same; of the findings of fact by the court, and the conclusions of law thereon; of the request of the defendants for additional findings of fact and the rulings of the court thereon; and of the opinion of the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this ninth day of October, A. D. 1876

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 522. The United States, appellants, vs. E. E. Norton, assignee in bankruptcy of Samuel DeBow & Company. Court of Claims. Filed 14th October, 1876.

REC. 522—2